In the United States

Circuit Court of Appeals

for the Ninth Circuit

JOE DUKICH, *Plaintiff in Error,* vs. THE UNITED STATES OF AMERICA, *Defendant in Error.*	No. 4149

PETITION FOR REHEARING.

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Filed.....Clerk.

COATES-HUGHES PRINTING CO.

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Comes now the plaintiff in error and petitions the court for a rehearing herein upon the following grounds:

The opinion holds that since by Section 332 of the Penal Code one who aids or abets the commission of an offense is a principal that he can be so charged without setting forth the evidentiary facts that make him legally a principal. In a strict legal sense it is undoubtedly correct that one who aids and abets in the commission of an offense, who is charged as a principal and who goes through a trial

without raising the objection that he had not been apprised of the nature and cause of the accusation against him, is precluded after a verdict from contending that there was a fatal variance between the charge and the proof. By permitting the introduction of evidence showing that he was acting through the agency of another without raising the objection that he was not apprised by the charge that he would be confronted with such evidence, he would undoubtedly waive the right to raise this objection after the rendition of a verdict. The contention, then, that there was a fatal variance between the information and the proof would be merely a technical one, which would not be tenable in view of Section 332 of the Criminal Code.

When the evidence was first presented which indicated that the defendant was to be charged with the act of another, an objection was made that he has not been apprised by the information that he would have to meet such testimony upon the trial, which objection was insisted upon at all stages of the proceedings. The question, then, became not whether there was a variance between the information and the proof in a strict legal sense, but whether the information sufficiently apprised the defendant of the charge against him so as to enable him to present his defense. That it did not do so must

be readily apparent to the court. The information led him to believe that the proof would show that he personally possessed and sold intoxicating liquor. The proof disclosed that he was sought to be held responsible for possession and sale by another party whose name was known and disclosed in the proof, but whose name was not stated in the information. Suppose the information in this cause had alleged that the defendant had made the sale by and through the agency of another person, would it have been sufficient had not the name of such other person been disclosed or an allegation made that the name of such other person was unknown? Yet such an information would have much more fully apprised the defendant of the charge against him and have enabled him to present his defense much better than if he had been led to believe that he would be held to answer for his own acts, whereas it was intended to charge him with the acts of another.

In *Simmons v. U. S.*, 24 L. Ed. 819, the information charged that the defendant "did knowingly and wilfully cause and procure to be used a still," etc. The court said (page 820):

> "Where the offense is purely statutory, having no relation to the common law, it is, 'As a general rule, sufficient in the indictment to charge the defendant with acts coming fully within the statutory description, in the substantial words of the statute, without any fur-

> ther expansion of the matter.' 1 Bishop, Crim. Proc., Sec. 611, and authorities there cited.) But to this general rule there is the qualification, fundamental in the law of criminal procedure, that the accused must be apprised by the indictment, with reasonable certainty of the nature of the accusation against him, to the end that he may prepare his defense and plead the judgment as a bar to any subsequent prosecution for the same offense. An indictment not so framed is defective, although it may follow the language of the statute.
>
> "Tested by these rules, the second count is insufficient. Since the defendant was not charged with using the still, boiler and other vessels himself, but only with causing and procuring some one else to use them, the name of that person should have been given. It was neither impracticable nor unreasonably difficult to have done so. If the name of such person was unknown to the grand jurors, that fact should have been stated in the indictment."

What difference can it make whether such a defect as above set forth be disclosed in the indictment or the proofs, provided that if it be in the latter a timely objection be made that the indictment did not properly apprise the defendant? If the defect be disclosed on the face of the indictment, it might well be argued that a bill of particulars would remedy it, whereas if it be hidden in a direct charge what remedy has a defendant, except by objection to the evidence which first discloses it?

If it be the law "that the accused must be apprised by the indictment with reasonable certainty

of the nature of the accusation against him, to the end that he may prepare his defense," what justification can be made of an information which charges him directly as a sole principal for the act of Martin, whose name was known to the District Attorney at the time the information was filed? Instead of the issue being the acts of the defendant himself in the main transactions charged, it became the acts of Martin therein and the relationship between the defendant and Martin. An entirely different character of proof was demanded in defense. The guilt of Martin was also in issue, and he was a material witness for the defense under the evidence, although not necessarily so under the charge.

While it may not be necessary to disclose all evidentiary facts in an information, yet sufficient should be alleged so that the defendant may know what issues he has to meet and what witnesses to produce.

The constitutional requirement that a man must be apprised of the nature and cause of the accusation against him is a matter of substance rather than form. The statute abolishing the technical distinctions between principals and accessories does not materially affect it. The statute merely does away with the requirement that an accessory shall be charged as such. There still remains the ques-

tion: Does the indictment sufficiently inform him so he can prepare his defense? If it does not it can make little difference whether he is charged as a principal or as an accessory.

In the two federal cases listed in the opinion, *Vane v. U. S.*, 254 Fed. 32; and *Rooney v. U. S.*, 203 Fed. 928, the defendant was charged jointly with others. Obviously each was apprised that all his acts in conjunction with the others, as well as their acts, would be matters which he would be required to meet.

It is respectfully submitted that the opinion should be modified to the extent of holding that under a charge of this character the objection to the evidence offered should have been sustained.

The opinion holds the instructions excepted to were without error, stating that they correctly incorporated the principle that a man may do a criminal act through the agency of another. It was contended in the brief that the parts of the instructions relating to sales by Martin contained assumptions of fact. These are quoted in Specifications of Error VI and VIII. They read as follows:

VI.

"* * * In this connection I further instruct you that if you find that at the time and

upon the occasion in question the defendant had in his employ as his agent the man referred to as the bartender and called Martin, *and that the sale of this liquor was made by Martin*, and you further find it was made in the presence of the defendant Dukich, and that he aided, abetted, counseled, commanded, induced or procured the bartender known as Martin *so to sell the liquor*, that in law would constitute Mr. Dukich a principal in that transaction *and he would be equally guilty with the man Martin who actually carried on and conducted the sale.*"

VIII.

"If you find from the evidence beyond all reasonable doubt that the bartender known as Martin was the agent or employee of the defendant Dukich, and that he sold or delivered to Regan *the intoxicating liquor referred to in the evidence,* and that at the time of such transaction the defendant Dukich was present and aided, abetted, counseled, advised or participated in the transaction, your verdict should be guilty."

It is contended that the italicized parts of the instructions assume facts to be established, and that this invaded the province of the jury. The first phrase, "and that the sale of this liquor was made by Martin," assumes that a sale of intoxicating liquor was made, "so to sell the liquor," is open to a similar objection. "And he would be equally guilty with the man Martin who actually carried on and conducted the sale," assumes that Martin did carry on and conduct a sale of intoxicating liquor.

The phrase, "the intoxicating liquor referred to in the evidence," assumes that not only was the contents of the bottle intoxicating liquor, but that the drinks referred to as having been purchased were likewise intoxicating liquor.

To assume a fact in an instruction is in effect to decide it, and where it is a necessary element to be shown in order to establish guilt, a defendant is deprived of his right to have it determined by a jury.

Konda v. U. S., 166 Fed. 91.
Dolan v. U. S., 123 Fed. 52.
Hicks v. U. S., 14 S. C. R. 144, 37 L. Ed. 1137.

It is respectfully submitted that a rehearing should be granted plaintiff in error.

E. W. ROBERTSON,
Attorney for Plaintiff in Error.

I hereby certify that in my judgment the above petition for rehearing is well founded and that it is not interposed for delay.

E. W. ROBERTSON,
Attorney for Plaintiff in Error.